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## Rule 11: Where We Are and Where We Are Going

### Cover Page Footnote

I would like to thank my colleague, Professor Michael M. Martin, who, as usual, provided me with moral support and helpful criticism.

## COMMENTARY

### RULE 11: WHERE WE ARE AND WHERE WE ARE GOING

GEORGENE M. VAIRO\*

*Professor Vairo discusses the compelling need to amend Federal Rule of Civil Procedure 11. She demonstrates that the rule is being used to limit advocacy in the federal courts, particularly in civil rights, employment discrimination, and other types of "disfavored" cases, and that it is creating wasteful satellite litigation. Lastly, she argues that three recent Supreme Court cases indicate that the Court is unwilling to address the problems caused by Rule 11. Professor Vairo thus advocates that the Federal Rules' Advisory Committee revise the rule by adopting the approach of the Bench-Bar Proposal.*

#### I. INTRODUCTION

There once was a time when people like J.D. Conley,<sup>1</sup> John Dioguardi,<sup>2</sup> Linda Brown,<sup>3</sup> or Alan Bakke<sup>4</sup> could feel free to seek a remedy from a federal court without fear of punishment. The claims presented in these plaintiffs' cases were problematic: J.D. Conley lacked specific facts to support his claims at the time he brought his suit; John Dioguardi's *pro se* complaint was nearly incomprehensible; Linda Brown sought to overturn a well-entrenched Supreme Court precedent; and Alan Bakke pushed a previously unsuccessful theory of reverse discrimination.<sup>5</sup>

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\* Associate Dean and Professor of Law at Fordham University School of Law. I would like to thank my colleague, Professor Michael M. Martin, who, as usual, provided me with moral support and helpful criticism.

1. See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). In *Conley*, the district court dismissed the complaint of black union members, who accused their union of race discrimination, because the complaint failed to allege specific facts. The Supreme Court reversed, holding that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief." *Id.* *Conley* facilitated the movement to the liberal form of notice pleading. See also *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (the Federal Rules of Civil Procedure "restrict the pleadings to the task of general notice-giving").

2. See *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). Dioguardi was a *pro se* plaintiff who alleged in an "obviously home drawn" complaint that the Collector of Customs had converted his property. See *id.* at 775. The Second Circuit reversed the dismissal of the complaint because "however inarticulately they may be stated, the plaintiff has disclosed his claims . . . we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes." *Id.* 774-75.

3. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Linda Brown was one of the plaintiffs in the *Brown* school desegregation cases which resulted in the overruling of the "separate but equal doctrine" of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

4. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Using the previously unsuccessful "reverse discrimination" argument, Alan Bakke successfully challenged the affirmative action plan of the University of California which gave preference to disadvantaged minority candidates. See *id.*

5. See *supra* notes 1-4 and accompanying text. Similarly, William Webster, the Attorney General of Missouri, felt free to defend a state law against a challenge that the law

Although the prospects for success in these cases were uncertain, these individuals and their lawyers knew they would be heard. They understood they might lose because of the novelty of their claims or defenses, or the lack of clear or specific proof, but they did not have to fear the immediate threat of sanctions for trying, because they asserted claims in good faith. Unfortunately, Rule 11 of the Federal Rules of Civil Procedure may be changing the calculus for litigating these types of cases. Opponents who feel victimized by the kind of claims described now have a tool to make these litigants think twice before proceeding and sometimes to make them pay if they proceed and lose. Thus, Rule 11 has become one of the most controversial topics in the federal courts over the last eight years.<sup>6</sup>

Since the 1983 amendments to Rule 11 became effective, seven major empirical studies have been published, dozens of law review articles have been written, several books and monographs have been published, thousands of reported opinions have been filed, and hundreds of bar association journal and legal and mainstream newspaper articles have been written which explore the reach and impact of Rule 11.<sup>7</sup> The numerous cases applying amended Rule 11 have resulted in a complex body of jurisprudence.<sup>8</sup> This complexity results from confusion about the purpose of Rule 11, from inconsistency in the case law, and from uncertainty over the effect Rule 11 is having on the federal civil litigation process. This confusion and complexity, in turn, raises two key questions which have been vigorously debated during the last eight years: 1) whether Rule 11 is being used to limit access to federal courts—the so-called “chilling effect” problem; and 2) whether Rule 11, as administered, is achieving the intended effect of streamlining federal litigation at an appropriate cost.

In July 1990, the Advisory Committee on Civil Rules announced a Call for Comments about Rule 11.<sup>9</sup> The vast majority of the Comments

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violated the Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973). See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

6. See Cochran, *Rule 11: The Road to Amendment*, 61 Miss. L.J. 5, 6-8 (1991) [hereinafter *Road to Amendment*]; Solovy & Kaster, *Rule 11: Framework for Debate*, 61 Miss. L.J. 1, 1 (1991) [hereinafter *Framework for Debate*]. See generally G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* § 1.01, at 3-4 (Supp. 1991) [hereinafter *Case Law Perspectives*] (Appendix F lists law review articles criticizing and applauding Rule 11).

7. See, e.g., *Case Law Perspectives*, *supra* note 6, § 1.01, at 3-4 (contains complete discussion of the case law under Rule 11); G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* §§ 25-28 (1989) [hereinafter *Litigation Abuse*] (discusses other federal sanctions tools, including the court's inherent power, 28 U.S.C. § 1927 (1988), and the rules governing discovery abuse).

8. I have written an eight hundred page treatise detailing the rule. See *Case Law Perspectives*, *supra* note 6. Greg Joseph has written a treatise on federal sanctioning power that devotes well over three hundred pages to Rule 11. See *Litigation Abuse*, *supra* note 7.

9. Committee on Rules of Prac. and Proc. of the Jud. Conf. of the U.S., *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*

received by the Advisory Committee were negative,<sup>10</sup> and, by design, most of the persons invited to testify about Rule 11 were critics of the rule.<sup>11</sup> After the hearing, the Advisory Committee prepared an Interim Report stating that specific amendments to Rule 11 were necessary and that certain criticisms of the rule needed to be addressed.<sup>12</sup> The Advisory Committee then drafted an amended version of Rule 11 ("Proposed Draft"), which was reviewed by the Committee on Rules of Practice and Procedure in July 1991.<sup>13</sup> In addition, a counter-proposal—the Bench-Bar Proposal put forth by a number of federal judges, distinguished attorneys, and leading commentators on Rule 11—has been circulated for comment.<sup>14</sup>

This Commentary presents an empirical framework for analyzing the critical issues raised by Rule 11: whether the rule is creating too much satellite litigation and whether it is being used disproportionately against certain types of plaintiffs. It then discusses three recent Supreme Court cases to demonstrate that the federal courts cannot, and the Supreme Court will not, meaningfully address the two critical problems Rule 11 has generated.<sup>15</sup> Finally, it analyzes the Advisory Committee's Proposed Draft of Rule 11 and the Bench-Bar Proposal and concludes that the latter provides a more effective cure to the most egregious problems created by the rule.

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(Aug. 1990), *reprinted in* 131 F.R.D. 335 (1990) [hereinafter Call for Written Comments].

10. I was one of 16 persons invited to testify at the public hearing. Accordingly, I received all the written responses to the Call for Comments and analyzed them. Over 100 groups and individuals responded. No more than 10% of the comments could be construed as indicating satisfaction with the current version of Rule 11.

11. *See infra* notes 100-01 and accompanying text.

12. Advisory Comm. on Civil Rules, Interim Report on Rule 11 (1991), *reprinted in* Case Law Perspectives, *supra* note 6, at I-2 app. I [hereinafter Interim Report].

13. *See* Fed. R. Civ. P. 11 Proposed Amendment, *reprinted in* 137 F.R.D. 74 (1991) (proposed on June 13, 1991) [hereinafter Proposed Draft]. The draft has been distributed to the bench and bar for comments. The Advisory Committee will receive comments until February 15, 1992 and will hold a hearing on the proposed amendments in Los Angeles on November 21, 1991. *See* Letter from Hon. Robert E. Keeton to The Bench and Bar, Aug. 15, 1991, *reprinted in* 137 F.R.D. 56 (1991). It is not anticipated that any amendments will be approved by the Standing Committee on Civil Rules until the summer of 1992 at the earliest. Under the Rules Enabling Act, the Supreme Court must transmit to Congress amendments proposed by the Standing Committee that it has approved by May 1 of the year in which the proposed rule would become effective. *See* 28 U.S.C. § 2074 (1988). The rule becomes effective on December 1 of that year, unless Congress takes action before that date. Thus, the earliest an amended rule could become effective is December 1, 1993.

14. *See* Higginbotham, J., *et al.*, Bench-Bar Proposal to Revise Civil Procedure Rule 11, *reprinted in* 137 F.R.D. 159 (1991) [hereinafter Bench-Bar Proposal].

15. For an analysis of all aspects of Rule 11 and extensive citations to cases discussing the various issues that have arisen since the rule was amended, *see* Case Law Perspectives, *supra* note 6, *passim*.

## II. CONFESSIONS OF AN INADVERTENT EMPIRICIST

Rule 11 has become a number-cruncher's paradise,<sup>16</sup> and I am perhaps to blame. In 1985, as the controversy about Rule 11 began to unfold, I was contacted by the New York Times for my impressions about the Rule 11 experience. I responded in rough percentages. The next day I received a call telling me that my "statistics" were being used in the article.<sup>17</sup> In a state of near-panic, I immediately reviewed the relatively small pile of all the Rule 11 cases that had been reported to that date to confirm my rough estimates. These "statistics," which I expanded and incorporated into an article about Rule 11,<sup>18</sup> quickly became ammunition for critics of Rule 11, because they seem to confirm that Rule 11 is being used disproportionately against plaintiffs, especially in civil rights, employment discrimination, and other types of "disfavored" litigation. The statistics also show that Rule 11 has become a "cottage industry" and is counterproductively producing more litigation instead of streamlining current litigation proceedings.

Professor Stephen Burbank, the Reporter for the Third Circuit Task Force on Federal Rule of Civil Procedure 11, criticized my survey of published Rule 11 cases as "highly problematic."<sup>19</sup> Although the picture emerging from any study is admittedly clouded by the methodology of its author, statistics can provide helpful generalizations. The purpose of my study was not to paint the definitive picture, but rather to provide the bench and bar with an overview of the Rule 11 experience and to show what the courts think is important enough to be reported.<sup>20</sup> In any event, the more carefully planned and "statistically correct" studies conducted since my frantic handcount confirmed my preliminary findings. Indeed, the key trends reported by the Third Circuit Task Force and the Federal Judicial Center in 1988 are comparable to those identified by my study.<sup>21</sup>

A. *How Confusion About The Primary Purpose of and Proper Approach to Rule 11 Caused a "Cottage Industry"*

Early Rule 11 opinions tended to ignore the stated purpose of Rule 11.

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16. See T. Willging, *The Rule 11 Sanctioning Process* 67-81 (Federal Judicial Center 1988) [hereinafter FJC Study]; American Judicature Soc'y, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* at 56 (1989) [hereinafter Third Circuit Task Force Report].

17. See Lewin, *A Legal Curb Raises Hackles*, N.Y. Times, Oct. 2, 1986, § D, at 1, col. 3.

18. See Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199-203 (1988) [hereinafter *A Critical Analysis*].

19. Third Circuit Task Force Report, *supra* note 16, at 56.

20. See, e.g., *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) (explicating purpose of amended Rule 11), *cert. denied*, 484 U.S. 918 (1987).

21. Although my statistics, based on reported cases, are more dramatic, the trends identified by the other two surveys were remarkably similar. See Third Circuit Task Force Report, *supra* note 16, at 56; FJC Study, *supra* note 16, at 75.

This is partly explained by the courts' confusion about the primary purpose of Rule 11. The 1983 Advisory Committee suggested that the amended rule was designed to deter abusive litigation behavior,<sup>22</sup> while a Federal Judicial Center Study stated that its purpose was "to *punish* the offending party, to *compensate* the injured party, and to *deter* . . . future [abusive] conduct."<sup>23</sup> Two practical problems resulted. First, the same Federal Judicial Center study demonstrated that compensation-oriented judges were more likely to impose sanctions than were those who were either punishment- or deterrence-oriented.<sup>24</sup> Thus, the case results and reasoning as to whether there was a Rule 11 violation were inconsistent.

Second, courts' views of the purpose of Rule 11 affected their determinations as to the type of sanction that should be imposed. *In re Yagman*<sup>25</sup> provides a good illustration of the problem. In this case, the district court imposed a sanction of \$250,000 in attorneys' fees at the end of the trial. The Ninth Circuit reversed, finding that the "primary purpose" of Rule 11 is to "deter subsequent abuses" in the same case.<sup>26</sup> Finding a Rule 11 violation and imposing a sanction at the end of the case, without giving the offender notice at the time of the abusive conduct, would not achieve the specific deterrent effect articulated by the court.<sup>27</sup>

If the court had found that the purpose of the rule was compensatory, a sanction of \$250,000 in attorneys' fees would have been appropriate because the defendant incurred costs of over \$290,000. The focus on deterrence resulted in a finding that the district court's process was flawed and that the sanction imposed was therefore improper. Thus, *Yagman* demonstrates the need for clear guidance on the specific purpose of Rule 11.

The failure of courts to consistently focus on the deterrent purpose of the rule when deciding Rule 11 cases, combined with the routine use of attorneys' fees as the sanction, has had counterproductive results. By issuing sanctions amounting to attorneys' fees in ninety-six percent<sup>28</sup> of the cases, courts implicitly accept the proposition that Rule 11 is a provision designed to provide the financial incentive necessary for attorneys to challenge their adversaries' questionable claims as being so groundless that the imposition of sanctions is warranted. Thus, many litigants now

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22. See Amendments to the Federal Rules of Civil Procedure, advisory committee notes, 97 F.R.D. 165, 198, 199 (1983) [hereinafter ACN].

23. S. Kassin, An Empirical Study of Rule 11 Sanctions (Federal Judicial Center 1985), reprinted in 330 PLI 473, 491 (1987) [hereinafter Empirical Study].

24. See *id.* at 512-13.

25. See generally *In re Yagman*, 796 F.2d 1165, 1183-84 (9th Cir. 1986) (court found that sanctions did not further the purpose of Rule 11), *cert. denied*, 484 U.S. 963 (1987).

26. See *id.* at 1183-84.

27. See *id.* But see ACN, *supra* note 22, at 200-01.

28. Cf. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1333 (1986) [hereinafter *Chilling Problems*] (concluding that monetary awards were employed in 96% of cases in which sanctions were imposed).

view Rule 11 as a fee-shifting device, which has caused a tremendous increase in the number of Rule 11 motions. Contrary to the purpose of Rule 11, a new form of litigation—Rule 11 motion practice—has flooded the courts and impeded the settlement of cases.

B. *The "Cottage Industry:"*  
*The Counterproductive Impact of Rule 11*

From 1938, when the Federal Rules of Civil Procedure were adopted, to 1983, there were only a handful of reported Rule 11 decisions.<sup>29</sup> During the first three and a half years after 1983, when Rule 11 was amended, 688 Rule 11 decisions were published—496 district court opinions and 192 circuit court opinions.<sup>30</sup> By the end of 1990, over 3,000 cases had been reported.<sup>31</sup> Although local legal culture seems to have an effect on attitudes about making Rule 11 motions,<sup>32</sup> the general success rate of Rule 11 motions is high enough to explain their vast increase in use.<sup>33</sup> It is this increased use of the rule that counterproductively has

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29. See Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems With Fed. R. Civ. P. 11*, 61 Minn. L. Rev. 1, 36-37 (1976) [hereinafter *Honesty in Pleading*] (reporting only 19 opinions, and only 3 in which a sanction was imposed).

30. See *A Critical Analysis*, *supra* note 18, at 199.

31. See New York State Bar Ass'n, Comments on Rule 11 of the Federal Rules of Civil Procedure 4 (Nov. 1990).

32. For the first few years after Rule 11 was amended almost one-third of the reported cases came from district courts in New York City and Chicago. Although that percentage declined as Rule 11 took hold throughout the country, Rule 11 is likely to remain largely an urban phenomenon, where practice is typically more impersonal, with less good-will among the attorneys. Attorneys in urban districts, therefore, are less reluctant to bring Rule 11 motions.

The Third Circuit Task Force Report similarly concluded that local legal culture regarding attitudes towards collegiality may have an effect on sanction incidence. See Third Circuit Task Force Report, *supra* note 16, at 62-65. In fact, most of the New Jersey cases involved New York lawyers. In one New Jersey case, the New Jersey local counsel "believed that the Rule 11 issue was raised because 'two New York attorneys were fighting like cats and dogs over discovery disputes. . . . had [it] been two New Jersey attorneys, it would not have happened.'" *Id.* at 63-64.

33. Between August 1, 1983 and December 15, 1987, Rule 11 sanctions were requested 680 times in reported cases. See *A Critical Analysis*, *supra* note 18, at 199. Violations were found, or warnings given, in 57.8% of these cases, and the rate of sanctions increased during the period studied. See *id.* Surveys indicate, however, that the rate of sanctions may be substantially lower in the unreported cases. See Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 Judicature 147, 149 (1990) [hereinafter *Impact of Rule 11 in Northern California*] (noting that the denial of sanctions motions in unreported cases is far higher than in reported cases). For example, attorneys responding to a New York State Bar Association survey reported that sanctions were awarded in 32% of the cases in which they are requested. See New York State Bar Ass'n, Report of the Committee on Federal Courts: Sanctions and Attorneys' Fees, at 2 (June 8, 1987). The Third Circuit Task Force Report noted that sanctions are imposed in only 13.6% of the cases in which they are requested. See Third Circuit Task Force Report, *supra* note 16, at 57. The Third Circuit, however, is known as a particularly lenient judge of alleged Rule 11 violations. See *id.* at 62; see, e.g., *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) (referring to motions under Rule 11 as bordering on the "abusive" where issues are close). Indeed, Prof. Burbank suspects that the rate of sanction is higher in other circuits, particularly the Seventh



created a "cottage industry" oriented against plaintiffs.

### 1. Is Rule 11 Deterring Meritless Claims?

The Advisory Committee hoped that by making attorneys' certification obligations clear, amended Rule 11 would encourage attorneys to practice more responsibly.<sup>34</sup> In the years since, it has become clear that Rule 11 is having such an impact on lawyers' practice. In a study of the Northern District of California, for example, Professor Melissa Nelken found that Rule 11 precipitated a decrease in filings of boilerplate defenses and counterclaims and discouraged "questionable cases."<sup>35</sup> The rule also has prompted many law firms to establish policies or guidelines regarding whether papers may be filed and whether a Rule 11 motion should be made.<sup>36</sup>

Despite these encouraging facts, the recent Federal Judicial Center Preliminary Report ("Preliminary Report") suggests that the problem of frivolous lawsuits is illusory and that Rule 11 may not be the best deterrent for improper filings. Indeed, approximately three-quarters of the responding judges thought groundless litigation was either only a small problem or no problem at all.<sup>37</sup> Moreover, only a few judges thought Rule 11 was "very effective" in deterring groundless pleadings.<sup>38</sup> These judges stated that other methods, such as prompt rulings on motions to dismiss, motions for summary judgment, Rule 16<sup>39</sup> status conferences, and warnings, were just as effective or more effective tools for managing groundless litigation.<sup>40</sup> Thus, at least one study implies that the frivolous litigation problem is no problem at all and that Rule 11 may not be the best cure for whatever ails the system.

### 2. Rule 11's Effect on Settlement

Because Rule 11 is designed to streamline litigation, it should have the effect of expediting the resolution of lawsuits. Although lawyers sur-

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Circuit. See Burbank, *American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1961-62 (1989) [hereinafter *American Civil Procedure*]. Nonetheless, the rate is high enough in general to encourage Rule 11 motions.

34. See Case Law Perspectives, *supra* note 6, § 1.03, at 8.

35. *Impact of Rule 11 in Northern California*, *supra* note 33, at 149-50.

36. See *id.* at 150.

37. See E. Wiggins & T. Willging, Rule 11 Judge Survey and Field Study Preliminary Reports § 4, at 2 (Federal Judicial Center 1991) (available in Fordham Law Review Office) [hereinafter Preliminary Report]. Ironically, over 80% of judges who responded to questions from the Federal Judicial Center indicated that they believed Rule 11 should be retained in its present form. See *id.* § 4, at 15. The Federal Judicial Center did not ask the judges to evaluate specific proposals for amending Rule 11. Rather it asked judges to choose between the current rule, the pre-1983 version of the rule, or an amended version of the rule. Only seven percent believed the rule should be returned to its pre-1983 language. See *id.* However, 12.5% thought the rule should be amended in some way. See *id.*

38. See *id.* § 4, at 4-5.

39. Fed. R. Civ. P. 16.

40. See Preliminary Report, *supra* note 37, § 4, at 13-14.

veyed in the Preliminary Report believed that Rule 11 has an impact on the settlement process, the evidence is unclear as to whether they believe the overall impact is positive or negative.<sup>41</sup> When there is an early finding of a Rule 11 violation, the threat of a sanction in marginal cases may create a climate that is favorable to settling the action, especially if the court has a policy of postponing the determination of the appropriate sanction until the end of the case. The attorney charged with violating the rule may feel pressured to "settle cheap" in the hopes of having any sanctions finding overturned. On the other hand, when a litigant believes the court is not impressed with a novel theory, the litigant may settle too cheaply, thereby obstructing the positive development of the law.

In contrast to lawyers, most judges surveyed in the Preliminary Report indicated that Rule 11 has no net effect on settlement.<sup>42</sup> Taken together with their responses that Rule 11 requests exacerbate unnecessarily contentious behavior between opposing parties,<sup>43</sup> however one may infer that the overall impact of Rule 11 on the settlement process is negative. Indeed, as Rule 11 motions have become more common, cordiality among attorneys has broken down, thus making it harder for judges to settle cases.<sup>44</sup> If Rule 11 discourages settlement, the promised benefits of a streamlined judicial system will not be achieved.

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41. *See id.*

42. *Id.* § 4, at 9-10. More than two-thirds of the judges surveyed in the Preliminary Report believe that Rule 11 either has no impact on the settlement process (37%) or that the net effect of the rule is even (32%), because the rule promotes settlement as often as it impedes it. *Id.* § 4, at 9. Twenty percent of the judges who responded, however, believe that Rule 11 impedes settlement in more cases than not. *Id.* Only 11% of those judges stated that the rule encourages settlement. *Id.* Interestingly, many judges failed to respond to the question about settlement effects, probably because judges are not always privy to the settlement practices or negotiations of the parties and they felt they could not offer a knowledgeable response. To the extent that many judges lack meaningful information about the settlement process, their responses may not, in fact, be helpful.

43. Over 50% of the judges surveyed indicated that Rule 11 exacerbates contentious behavior between opposing parties. *Id.* Only 7.9% think Rule 11 requests curtail such behavior, and only 7.9% think Rule 11 requests have no effect on the interactions of opposing counsel. *Id.* Almost 42% of the judges believed that Rule 11 had no net effect on the parties behavior because in some cases it exacerbates poor behavior and in others it curtails it. *See id.*; *see also* FJC Study, *supra* note 16, at 115-20 (studies reflect concern that sanctions may be used as bargaining chips in settlement negotiation). *But see* Third Circuit Task Force Report, *supra* note 16, at 85-86 (finding little evidence that Rule 11 has poisoned relationships between the bench and bar and only some evidence that the rule has poisoned relationships among opposing counsel).

44. *See, e.g.,* Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 752 (S.D.N.Y. 1985) (sanctions destroy professional collegiality necessary for prompt and fair settlements); Weinstein, *Reflections on the 1983 Amendments to U.S. Rules of Civil Procedure*, N.Y.L.J., Nov. 14, 1983, at 4, col. 1 (sanctions found to be counterproductive because they can create ill will among attorneys and between the judge and attorneys); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 Tex. Tech. L. Rev. 887, 903 (1984) [hereinafter *Recent Changes*] (sanctioning may convert atmosphere of cooperation into combativeness).

### C. *The Chilling Effects of Rule 11*

#### 1. Rule 11 as a Defendant's Tool

Critics feared that Rule 11 would be used to chill access to the federal courts because the rule would be employed aggressively by defense attorneys against litigants like John Dioguardi and Linda Brown.<sup>45</sup> The reported cases justify those fears and suggest that amended Rule 11 is being used disproportionately against plaintiffs,<sup>46</sup> particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by smaller companies.<sup>47</sup> In fact, the Federal Judicial Center's 1991 Preliminary Report reveals that the rule is even more pro-defendant than previously realized.<sup>48</sup>

This disparate result is hardly surprising, since most Rule 11 cases involve challenges to pleadings. The Advisory Committee Note to Rule 11 mentions pleadings violations more frequently than other types of violations and suggests that the most problematic pleading is the complaint.<sup>49</sup> The perception seems to be that "the plaintiff started it." Accordingly, defendants are encouraged to use Rule 11 to weed out and punish parties who file groundless complaints. In addition, because defendants generally want to increase settlement leverage and benefit more from delay than plaintiffs, they have a greater incentive to seek Rule 11

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45. See *supra* notes 2-3 and accompanying text.

46. Plaintiffs are sanctioned in 59.6% of the cases in which they are the target, while defendants are sanctioned in 51.4% of the cases in which they are the target. See Third Circuit Task Force Report, *supra* note 16, at 57. But see FJC Study, *supra* note 16, at 75 (finding that the rate of imposition of sanctions on defendants (76%) was actually greater than the rate for plaintiffs (60%, although plaintiffs were still targeted for sanctions more often)).

47. See *A Critical Analysis*, *supra* note 18, at 200-01. "In the 57.8% of the reported cases in which a Rule 11 violation is found, the plaintiff is the violator in 46.9% of the cases, while the defendant is the violator in only 10.9% of the cases. This great difference is explained by the fact that the plaintiff is the *target* of the sanctions motion in 536 of the 680 reported Rule 11 cases (78.8%)." *Id.* at 200. The Federal Judicial Center study also shows that plaintiffs are targets in four times as many cases as defendants are targets. See FJC Study, *supra* note 16, at 75 & n.153. The Third Circuit Task Force Report numbers, which included reported and unreported cases within the Third Circuit, "are not as striking as statistics based on published decisions" but tend to confirm the hypothesis of much more frequent invocation of Rule 11 against plaintiffs than defendants. Third Circuit Task Force Report, *supra* note 16, at 65.

48. In the five districts surveyed in the study, the plaintiff-defendant sanction ratio was 80% to 7%, 77% to 23%, 81% to 9%, 80% to 20%, and 61% to 38%. See Preliminary Report, *supra* note 37, § 2, at 19. In the Eastern District of Michigan, the plaintiff's side was targeted 72% of the time and the defendant's side 25% of the time. See *id.* at 17. In the Western District of Texas, the spread was 52% plaintiffs, 44% defendants; in the District of Arizona, the spread was 55% plaintiffs, 40% defendants; in the District of Columbia, the spread was 59% plaintiffs, 39% defendants; and finally in the Northern District of Georgia, the spread was 59% plaintiffs, and 35% defendants. See *id.*

49. Cf. ACN, *supra* note 22, at 198-201 (discusses pleadings violations).

sanctions.<sup>50</sup> The various studies of Rule 11 thus illustrate a serious imbalance in the rule, favoring defendants at the expense of the plaintiff and her attorney. The disparate rate of sanction must be eliminated to avoid the appearance and existence of unfairness to one "side" of the litigation equation.

## 2. Disfavored Actions

Many commentators<sup>51</sup> object to Rule 11 on the ground that the rule "chills" vigorous advocacy, especially in "disfavored" lawsuits such as civil rights and employment discrimination cases and certain kinds of securities fraud and RICO cases.<sup>52</sup> The statistics generated from the reported cases corroborate this view because they show that such cases are the subject of a disproportionately high number of Rule 11 cases.<sup>53</sup> Plaintiffs are the targets of the sanction request in 86.4% of civil rights and employment discrimination cases,<sup>54</sup> and they are sanctioned at a much higher rate than plaintiffs in other cases.<sup>55</sup>

It is difficult to generalize about the significance of these statistics. The large number of cases in which sanctions are awarded may mean one of two things: 1) that there are relatively more frivolous civil rights cases, and that these cases are being justifiably dismissed and the offending parties and attorneys rightfully sanctioned; or 2) that Rule 11 is an unfair tool for defendants that allows them to unfairly attack civil rights plaintiffs. Unfortunately, there is ample statistical evidence that the latter is

50. See Third Circuit Task Force Report, *supra* note 16, at 67-68. This study notes that the differential impact of Rule 11 on plaintiffs is likely to continue. See *id.* at 68.

51. There has been an explosion of articles about Rule 11. Most are critical of the rule. See, e.g., *Chilling Problems*, *supra* note 28, at 1338-52 (arguing that Rule 11 has had a "chilling effect" on the assertion of claims and defenses on the lawyer-client relationship); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630 *passim* (1987) [hereinafter *Plausible Pleadings*] (arguing that the courts have applied Rule 11 too broadly, thus causing excessive constraints on pleadings). For a list of all law review articles written on Rule 11, see Case Law Perspectives, *supra* note 6, at app. F.

52. *Chilling Problems*, *supra* note 28, at 1340-41.

53. See, e.g., FJC Study, *supra* note 16, at 74 (twenty-five percent of Rule 11 cases were civil rights cases); *id.* at 160-62 (civil rights filings were only 7.6% of civil filings from 1983-1985, but accounted for 22.3% of published Rule 11 decisions). But see Third Circuit Task Force Report, *supra* note 16, at 69-70 (finding "less reason for concern" at least in the Third Circuit; requests for sanctions in civil rights cases (18.2%) were only slightly higher than would be expected on the basis of the percentage of such cases filed (16%)).

54. See *A Critical Analysis*, *supra* note 18, at 200. This statistic includes *pro se* civil rights and employment discrimination actions. It does not include tax protest cases. See *id.* at 200 n.60.

55. Sanctions are awarded against plaintiffs in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%). See *A Critical Analysis*, *supra* note 18, at 200-01. Defendants are targeted in 13.6% of the cases, and sanctioned in 50% of these cases, but this represents only 6.8% of all civil rights and employment discrimination Rule 11 cases. See *id.* at 201.

the explanation in far too many cases.<sup>56</sup>

The Rule 11 experience in cases involving securities fraud and RICO violations provides an interesting contrast to both the civil rights area and Rule 11 cases in general. Although plaintiffs in securities fraud and RICO cases are the target of sanctions motions at a slightly higher rate than in civil rights cases, (84.3% of these cases), they are sanctioned in only 45.5% of the cases.<sup>57</sup> One explanation for the higher target rate of sanctions motions may be that attorneys in the large firms that typically defend trade regulation cases have enthusiastically embraced Rule 11 to deter what are perceived to be strike suits.

An explanation for the disparity in the success rate of sanctions motions may be that judges are more willing to accept innovative legal theories advanced by plaintiffs in securities fraud and RICO cases, where much of the law is unsettled, than in the more developed areas of civil rights and employment discrimination law.<sup>58</sup> Indeed, most of the sanctions in the civil rights categories are awarded because the plaintiff's legal theory has been held to be frivolous,<sup>59</sup> while in securities fraud and RICO cases, the basis for a sanction is more likely to be a failure to engage in a reasonable inquiry as to the factual basis for the claims.<sup>60</sup>

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56. The Federal Judicial Center attempted to study this question in its survey by asking lawyers whether they refrained from bringing arguably meritorious cases because of a concern about sanctions. See FJC Study, *supra* note 16, at 167. Twenty percent responded affirmatively. *Id.* at 163. Lawyers also indicated that the threat of Rule 11 sanctions had a cautioning effect on their practice. See *id.* at 167. See generally Preliminary Report, *supra* note 37 (contains interesting data on the types of civil rights cases and arguments that were the subject of sanctions).

57. *A Critical Analysis*, *supra* note 18, at 201. Securities fraud and RICO cases comprise 15.2% of the Rule 11 cases, and antitrust and other trade regulation cases comprise another 10% of the cases. See *id.*; see also FJC Study, *supra* note 16, at 74 (RICO cases constituted 8%, Securities/Commodities cases 5%, and Antitrust cases 5% of the sample of reported decisions studied).

58. However, the law in civil rights and employment discrimination cases arguably is just as dynamic as in securities fraud and RICO cases.

59. See Case Law Perspectives, *supra* note 6, § 4.01[b][1][C], at 170-79.

60. See *id.* § 6.05[e], at 473-74. As might be expected from the foregoing discussion, the complaint leads to the greatest amount of sanctions activity. The Third Circuit Task Force reported that complaints formed the basis for 50% of the requests for sanctions. See Third Circuit Task Force Report, *supra* note 16, at 66.

Another area, but one in which quite an opposite picture emerges, is diversity contract or other commercial dispute cases. In these cases, which comprise 15.9%, of the Rule 11 cases, the plaintiff is the target only 58.3% of the time, and the defendant is the target 41.7% of the time. See *A Critical Analysis*, *supra* note 18, at 202; see also Third Circuit Task Force Report, *supra* note 16, at 108-09 (contracts cases comprised 24.7% of the cases studied in this report). The most surprising finding, however, is that the defendant is actually sanctioned at a higher rate than plaintiffs. Plaintiffs are sanctioned in 52.4% of the cases in which they are the targets, which is lower than the corrected average, and defendants are sanctioned 55.6% of the time in which they are the targets. See *A Critical Analysis*, *supra* note 18, at 202. Perhaps this is because the relative "strength" of the parties in terms of the merits of the case and perceived quality of the representation and advocacy favors the plaintiffs in these cases. In other words, perhaps the perception that defendants unjustifiably stonewall in these cases makes them the more likely Rule 11 offender. See *id.*

The statistical picture that has developed since Rule 11 was amended is an interesting one. The data strongly suggest that Rule 11's impact has been far greater than the 1983 Advisory Committee predicted. Unfortunately, statistical studies do not help develop criteria for determining whether Rule 11 is worth its costs. The Rule 11 debate implicates the fundamental tenets of the federal system of civil procedure and asks whether we can afford notice pleading and a liberal discovery system which, in the estimation of some, stacks the deck too much in favor of plaintiffs.<sup>61</sup> Thus, the Rule 11 dilemma cannot be resolved until the Advisory Committee meets that issue head-on by examining our whole system of rules, rather than trying to use Rule 11 as a quick fix for all the system's perceived ills.

Indeed, drastic changes in the judicial climate over the last ten years parallel the issues raised by Rule 11. The most important change is that the Supreme Court has been guarding the federal courthouse door more and more zealously through the use of summary judgement and other doctrines, such as standing and abstention.<sup>62</sup> The Court's implementation of Rule 11 can be viewed as part of this trend to limit access to the federal courts.

### III. THE SUPREME COURT: TAKING RULE 11 LITERALLY

By interpreting Rule 11 literally, three recent Supreme Court cases—*Pavelic & LeFlore v. Marvel Entertainment Group*,<sup>63</sup> *Cooter & Gell v. Hartmarx Corp.*,<sup>64</sup> and *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*<sup>65</sup>—have ignored the “chilling effect” and “satellite litigation” problems caused by Rule 11. First, the Court's literal interpretation that focuses on *strict* deterrence is unforgiving to plaintiffs who have claims that are at the edge of the law. Second, its literal interpretation of the rule ironically encourages satellite litigation by allowing parties to litigate Rule 11 sanctions even after the original complaint has been withdrawn voluntarily by the plaintiff. Lastly, the Court's literal interpretation permits and even encourages the use of Rule 11 as a fee-shifting device.

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61. See generally Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 492-93 (1986) [hereinafter *Revival of Fact Pleading*] (notice pleading should be abandoned since it affords broad discovery to abusive litigants and is merely an expensive waste of time).

62. See Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings*, 58 Fordham L. Rev. 173, 174-76 (1989) [hereinafter *Making Younger Civil*]; Vairo, *Through the Prism: Summary Judgment and the Trilogy*, in 3 Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal and State Courts 1557, 1560 (ALI-ABA 1991) [hereinafter *Through the Prism*].

63. 110 S. Ct. 456 (1989).

64. 110 S. Ct. 2447 (1990).

65. 111 S. Ct. 922 (1991).

### A. Pavelic & LeFlore: *May Non-Signers be Sanctioned?*

*Pavelic & LeFlore* instituted the literal interpretation approach to Rule 11.<sup>66</sup> The question in this case was whether only the attorney signing a paper which violated Rule 11 could be sanctioned, or whether the signing attorney's law firm could also be sanctioned. Reasoning that the language of the rule permitted only the signer to be sanctioned, the Court refused to impose liability on the law firm.<sup>67</sup> Although the Court agreed that permitting sanctions against the law firm would "better guarantee reimbursement of the innocent party," it found that the key purpose of Rule 11 is deterrence<sup>68</sup> and that a literal approach to Rule 11 would have "greater economic deterrence upon the signing attorney"<sup>69</sup> than would a broad imposition of liability on the law firm.

While the emphasis on the deterrent effect of the rule is worthwhile in that it could minimize the use of fee-shifting sanctions, it is clear that the Supreme Court has in mind strict deterrence, rather than amelioration of the harsher effects of Rule 11. The Court's strict interpretation of Rule 11 thus forebodes even greater problems for those who would raise claims that are at the edge of the law. If one files such a claim, but then is persuaded it is not worth the candle and voluntarily dismisses, one runs the risk of being sanctioned.<sup>70</sup>

### B. Cooter & Gell: *Jurisdiction and Standard of Review*

*Cooter & Gell* signaled an even tougher approach to Rule 11.<sup>71</sup> The Court in this case addressed three issues: 1) whether the district court had the power to sanction a party who voluntarily dismissed an action; 2) what is the appropriate appellate standard of review in a Rule 11 case; and 3) whether additional sanctions in the form of attorneys' fees may be imposed for defending a Rule 11 award on appeal.<sup>72</sup> The Court's answers to the first two questions, which will be discussed below, have the potential to exacerbate the rule's chilling effect and the current satellite litigation problems.

#### 1. When Does a Court Have Jurisdiction to Sanction?

A litigant who becomes aware that a particular paper, negligently filed,

66. See *Pavelic & LeFlore*, 110 S. Ct. at 458. The Court stated that it would "give the Federal Rules of Civil Procedure their plain meaning." *Id.* at 458.

67. See *id.* at 458-60.

68. *Id.* at 460.

69. *Id.*

70. See, e.g., *Harris v. Marsh*, 679 F. Supp. 1204, 1387-88 (E.D.N.C. 1987) (court imposed sanctions against Title VII plaintiffs and their attorneys involved in large employment discrimination class action against U.S. Army after they voluntarily withdrew most claims before trial), *aff'd in relevant part sub nom.* *Blue v. U.S. Dep't of Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991).

71. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990).

72. For discussion of this aspect of *Cooter & Gell*, see Case Law Perspectives, *supra* note 6, § 9.04[b], at 684-89.

is groundless should be permitted in most cases to withdraw the paper without risking sanctions. Permitting sanctions litigation at this point simply delays adjudication of other cases in the queue.<sup>73</sup> Unfortunately, the *Cooter & Gell* Court found that a district court has jurisdiction to sanction even when a case is voluntarily dismissed under Rule 41(a)(1)(i).<sup>74</sup> Because the issue under Rule 11 is collateral to the merits, the Court reasoned that a district court has continuing jurisdiction to punish abuses.<sup>75</sup>

This analysis is unfortunate because it neglects the underlying purpose of Rule 11—to streamline litigation. Rather than permit a litigant to “cure” a Rule 11 violation by voluntarily dismissing an action, the Court allows a litigant to be punished years after the voluntary dismissal of its complaint. Resurrecting a dismissed case for the purpose of litigating the sanctions issue is nonsensical when a federal court is backed up with hundreds of other active cases. In addition, the Court’s literal, non-policy-based opinion on the jurisdictional issue has forced lower courts to grapple<sup>76</sup> with the unfairness that results when a court seeks to impose sanctions in cases of dubious “jurisdiction.”<sup>77</sup>

## 2. What is the Appellate Standard of Review?

Before the adoption of the abuse of discretion standard in *Cooter & Gell*, there was widespread disagreement among the courts of appeals regarding the appropriate standard of review. Some courts adopted a deferential abuse of discretion standard.<sup>78</sup> Others used a multi-tiered approach which depended on the Rule 11 issue raised on appeal: issues of fact would be reviewed under the clearly erroneous standard, issues of law would be reviewed *de novo*, and the type of sanction imposed would be reviewed under the abuse of discretion standard.<sup>79</sup>

Despite its unifying effect, the *Cooter & Gell* Court’s abuse of discretion standard of appellate review is problematic<sup>80</sup> in light of the wide-

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73. See *A Critical Analysis*, *supra* note 18, at 211-12.

74. See *Cooter & Gell*, 110 S. Ct. at 2457; see also *A Critical Analysis*, *supra* note 18, at 211 (discussing split in courts prior to *Cooter & Gell*). This issue is discussed fully in *Case Law Perspectives*, *supra* note 6, § 7.07[f], at 535-36.

75. See *Cooter & Gell*, 110 S. Ct. at 2457.

76. See generally *Case Law Perspectives*, *supra* note 6, § 3.02[b], *passim* (discussing recent cases dealing with jurisdiction to impose sanctions following dismissal for lack of jurisdiction, voluntary dismissal, dismissal under Rule 41, transfer of venue, and other case dispositions).

77. See, e.g., *Willy v. Coastal Corp.*, 915 F.2d 965 (5th Cir. 1990) (holding that the court had jurisdiction to impose Rule 11 sanctions even though it lacked subject matter jurisdiction over the plaintiff’s original claim), *cert. granted*, 111 S. Ct. 2824 (1991) (petition granted with respect to jurisdictional question).

78. For cases discussing the abuse of discretion standard of review, see *Case Law Perspectives*, *supra* note 6, § 8.04[d][1], at 577-84.

79. See *id.* § 8.04[d][2], at 585-92.

80. For a full discussion of this issue, see *Case Law Perspectives*, *supra* note 6, § 8.04, at 594; see also *id.* § 2.03[c][2], at 66-70 (discussing a recent Fifth Circuit decision elaborating on the abuse of discretion standard).



spread concern that Rule 11 is not applied fairly or consistently by the district courts. Giving the courts of appeals the opportunity to quickly affirm denials of sanctions is one thing; giving undue deference to district courts which have imposed sanctions is another. Neither the goal of reducing the indeterminacy of Rule 11 nor the goal of fairness to those sanctioned is served by the highly deferential type of abuse review envisioned by the Court.<sup>81</sup> Moreover, the Court's failure to develop clear standards of conduct enhances the "crap-shoot" aspect of Rule 11, which encourages lawyers to move for sanctions in questionable cases, in the hopes of recovering their fees.<sup>82</sup> Under the *Cooter & Gell* standard, it is possible to be sanctioned even if there is a judge who agrees that an argument is meritorious or, at least, not frivolous.<sup>83</sup> This observation points

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81. The *Thomas* approach, which adopted an abuse of discretion standard, but called for differing levels of scrutiny depending on the result of the district court's analysis, is preferable. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 871 (5th Cir. 1988) (en banc); Case Law Perspectives, *supra* note 6, § 2.03[c][2], at 66-70; see also Johnson, Keeling & Contois, *The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions*, 61 Miss. L.J. 39, 45-47 (1991) [hereinafter *Reversing the Trend*] (discussing the problems of appellate court enforcement of "least severe sanction adequate" and the abuse of discretion standard of review adopted by the courts). The *Thomas* court would increase the scrutiny depending on the nature of the violation and the type or amount of the sanction imposed, thereby providing a measure of consistency and fairness to those sanctioned. See Case Law Perspectives, *supra* note 6, § 8.04[d][4][A], at 595-96.

82. Proponents of Rule 11 suggest that these have been the "shakeout" years, and that over time, the courts of appeals will develop coherent standards for applying Rule 11. See Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505-06 (1990) [hereinafter *New Certification Standard*]. However, a study of the cases decided suggests that the district courts have yet to receive the guidance they need to apply the rule fairly or uniformly.

Whether the courts of appeals are controlling the district courts is an important question in this context. Circuit courts have affirmed district courts' awards of sanctions in 38.5% of the appeals and have affirmed their refusal to award sanctions in 30.2% of the cases. See *A Critical Analysis*, *supra* note 18, at 202-03. Thus, they have agreed with the district courts in 68.7% of the cases. See *id.* That does not seem to suggest a great deal of control. However, and not surprisingly, it is in the cases in which the court of appeals disagrees with the district court that one finds most of the opinions with extensive exposition of the rule. The courts of appeals have reversed a sanction in 19.2% of the cases, and have reversed the refusal to grant a sanction in 12% of the cases. See *id.* Thus, the suggestion by some that there is a general trend of restraint in the courts of appeals is not borne out by the reported cases. A signal from the Supreme Court to be more careful when reviewing appeals from orders imposing sanctions might have resulted in a more coherent set of guidelines as to what kind of conduct is proscribed.

83. For example, in *Danese v. City of Roseville*, 757 F. Supp. 827 (E.D. Mich. 1987), *rev'd sub. nom.* *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990), the plaintiffs brought a civil rights action against city officials and employees. The district court ruled in favor of plaintiffs. On appeal, the Sixth Circuit, in a split decision, reversed. See *Danese*, 875 F.2d 1239. Defendants then moved to recover actual costs and attorney fees. The district court denied Rule 11 sanctions, stating that plaintiffs' conduct was within the parameters of acceptable professional conduct. As evidenced by plaintiffs' success in the district court and by the split decision in the Court of Appeals, plaintiffs presented reasonable theories of recovery in their complaint based on an adequate inquiry into relevant facts and a sufficient investigation of the relevant law.

Additionally, plaintiffs' contentions may have been warranted by a good-faith argument for the extension, modification, or reversal of existing law, as evidenced by the

out the subjectivity problem of Rule 11 and its potential chilling effect on the development of the law. The need for strict appellate review when sanctions are imposed is manifest.<sup>84</sup>

### C. Business Guides: *Attorneys' Fees as Sanctions*

Using its literal approach to Rule 11 and applying the same objective standard to represented parties as to attorneys, the Court in *Business Guides* held that Rule 11 is valid under the Rules Enabling Act.<sup>85</sup> The Court also adopted a test for determining which papers were subject to Rule 11.<sup>86</sup> However, the Court in this case interpreted and applied Rule 11 without considering its practical effect.

The *Business Guides* Court rejected the argument that imposing sanctions against a represented party who acted in good faith violated the Rules Enabling Act.<sup>87</sup> Applying its "plain meaning" approach to the interpretation of Rule 11, the Court stated that "[t]he essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously."<sup>88</sup> Accordingly, a district court may sanction a represented party for signing a paper in violation of Rule 11,<sup>89</sup> because "[a] contrary rule would establish a safe harbor such that sanctions could not

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appellate court's split decision in favor of defendants. *Danese*, 757 F. Supp. at 829-30. The court also noted that there was no evidence of bad faith or improper motive. *See id.* at 830.

84. In some cases, a sanctioned litigant or attorney will ultimately succeed in reversing the sanctions imposed. For example, in *Alia v. Michigan Supreme Court*, 906 F.2d 1100 (6th Cir. 1990), the district court dismissed the complaint and imposed sanctions. Two judges affirmed the dismissal of the complaint. One of those judges and the dissenting judge reversed the sanctions.

In other cases, the sanctioned party will not only succeed in reversing the sanctions, but also will prevail on the law. In *In re Edmonds*, 924 F.2d 176 (10th Cir. 1991), a creditor filed a complaint to revoke debtor's discharge in a bankruptcy proceeding. The debtor moved to dismiss on laches and statute of limitations grounds. The bankruptcy court granted the motion and imposed Bankruptcy Rule 9011 sanctions. The district court affirmed. The Tenth Circuit disagreed, noting that "in its pleadings before the bankruptcy court, creditor advanced a colorable argument why the affirmative defense of laches and one-year statute of limitations should not bar its revocation." *Id.* at 181. The Court of Appeals reinstated the complaint and reversed the sanctions.

Even issues that prove to be meritorious at the Supreme Court level are not immune from attack. In *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1407 (N.D. Cal. 1987), the district court dismissed the complaint. The court's ruling on the sanctions issue was ambiguous. On appeal to the Ninth Circuit, the dismissal was affirmed, but the court ruled that sanctions would be improper because a good faith legal argument was made. *See Masson*, 895 F.2d 1535, 1547 (9th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 2419 (1991). The Supreme Court then reversed on the merits! *See Masson*, 111 S. Ct. 2419.

85. *See Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 933-34 (1991).

86. *See id.* at 929.

87. *See id.* at 934.

88. *Id.* at 930.

89. *See id.* at 930-31.

be imposed where an attorney, pressed to act quickly, reasonably relies on a client's careless misrepresentations."<sup>90</sup> This part of *Business Guides* is troubling because the majority's opinion, while hiding behind its plain meaning approach, expands the potential for sanctions. It goes beyond the intent of the Advisory Committee and ignores the practical implications of its ruling: the creation of yet another Rule 11 target from whom attorneys' fees may be sought.

The *Business Guides* Court rejected the argument that Rule 11 might be invalid under the Rules Enabling Act because of its substantive impact.<sup>91</sup> This argument posits that Rule 11, by imposing an objective standard of reasonableness on represented parties, exceeds the limit of a court's power by permitting fee-shifting in a manner not approved by Congress and by creating a federal tort of malicious prosecution.<sup>92</sup> Noting that Congress does "participate[ ] in the rulemaking process,"<sup>93</sup> the Court found that "'rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.'"<sup>94</sup>

The duplicity here is that the Court continues to stress that attorneys' fees are not an entitlement and that litigation should be streamlined,<sup>95</sup> while it ignores the fact that attorneys' fees are the type of sanction most frequently imposed. Thus, the *Business Guides* Court fails to grapple with the critical issues raised by Rule 11 and keeps in place the same incentives which have caused a proliferation of Rule 11 motions.

#### D. The Current State of Rule 11 Law

*Pavelic & LeFlore*, *Cooter & Gell*, and *Business Guides* have answered some specific questions about Rule 11. We now know that only the attorney signing the paper may be sanctioned under Rule 11, that sanctions may be imposed after a case is voluntarily dismissed, that the standard of review is abuse of discretion, and that the primary purpose of the rule is deterrence. Yet there are numerous problems left unresolved. For example, although we know that district judges are given broad discretion in imposing sanctions for frivolous litigation, we still do not know what "frivolous" means beyond what the district court thinks it means. Nor

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90. *Id.* at 933. The dissent argued that the Advisory Committee did not intend to extend Rule 11 to represented parties who sign a paper. *See id.* at 940-41 (Kennedy, J., dissenting). Rather, it intended to make sure that *pro se* litigants were covered by the amended rule. *See id.* at 937, 940 (Kennedy, J., dissenting). Moreover, the key purpose of the 1983 amendments to Rule 11 was to provide an effective tool for disciplining lawyers who filed papers without adequate investigation. *See id.* at 935-37 (Kennedy, J., dissenting).

91. *See id.* at 933-35.

92. *See* Case Law Perspectives, *supra* note 6, § 2.03[b], at 52.

93. *Business Guides*, 111 S. Ct. at 933 (quoting C. Wright & A. Miller, Federal Practice and Procedure § 1332, at 39-40 & n.74 (2d ed. 1990)).

94. *Id.* at 934 (quoting *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 5 (1987) (emphasis added)).

95. *See id.*

do we know what a reasonably competent attorney is supposed to do to protect a client's interests or what will happen if a lawyer guesses wrong and is on the wrong side of a frivolous finding.

The Supreme Court cases demonstrate that the Court is committed to ending abuses and carrying out the Advisory Committee's intent. Indeed, the Court constantly speaks of abuses which connote bad faith. But the Court has ignored the thrust of Rule 11, which is aimed at merely negligent conduct, and consistently has used a literal approach to punish behavior of parties whose conduct often borders on bad faith. Thus, one is left with the impression that the real reason for a tough approach to the rule is to combat the few cosmic anecdotes about nightmare litigations. Meanwhile, lawyers are faced with practicing in the face of this potentially awesome tool which, according to the Supreme Court's broad language and holdings, not only subsumes truly abusive conduct, but also applies to cases in which a party is simply on the wrong side of the issue. "While the word 'abusive' may have some subjective content, the word generally connotes wrongdoing. The word 'frivolous' merely connotes wrongheaded. Wrongdoing should be deterred. The process of winning and losing takes ample care of the wrongheaded."<sup>96</sup>

#### IV. AMENDING AMENDED RULE 11

##### A. *The Call for Comments and the Public Hearing*

In July 1990, the Advisory Committee responded to continued criticisms of Rule 11 by announcing a Call for Comments about the rule and a public hearing.<sup>97</sup> The Call for Comments solicited responses to ten questions, and over one hundred groups and individuals replied.<sup>98</sup> In addition, the Advisory Committee asked the Federal Judicial Center to conduct empirical studies.<sup>99</sup> In February 1991, the Advisory Committee held a public hearing at which sixteen persons were invited to testify.<sup>100</sup> The persons invited (including this author) consisted mainly of critics of

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96. New York State Bar Ass'n, Report of the Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts (March 20, 1990), *reprinted in* 18 Fordham Urb. L.J. 3, 12 (1990) [hereinafter *Frivolous Litigation*]. I was one of the drafters of this report.

97. See Call for Written Comments, *supra* note 9.

98. For discussion of these questions, see *infra* notes 103-10 and accompanying text.

99. See Preliminary Report, *supra* note 37.

100. Three judges testified: Judge Mary M. Schroeder of the Ninth Circuit, Judge Patrick Higginbotham of the Fifth Circuit, and Judge Carl Rubin from the Southern District of Ohio. Nine members of the bar testified for various groups: Jerold S. Solovy for the ABA Litigation Section, Francis H. Fox for the American College of Trial Lawyers, Jeffrey Stempel for the Bar Association of the City of New York, Arthur Radke for the Chicago Bar association, Robert Mullen for the Lawyers' Committee for Civil Right, C. Steven Tomashefsky for the Chicago Council of Lawyers, Errol Brown for the National Bar Association, and Michael A. Mack for the American Insurance Association. I was also invited to testify, along with two other law professors and an attorney who have written extensively about Rule 11: Professor Maurice Rosenberg of Columbia Law

the rule.<sup>101</sup> During the day-long public hearing, the members of the Advisory Committee asked numerous questions and engaged in extensive dialogue with those testifying regarding their responses to the ten questions posed in the Call for Comments.<sup>102</sup>

Most of the questions dealt with the issues raised in this Commentary. Question 1 was designed to elicit views as to whether Rule 11 has achieved its purposes of discouraging misuse of the Federal Rules of Civil Procedure and requiring lawyers to "stop and think" before filing papers.<sup>103</sup> Questions 2 and 3 inquired into the costs of Rule 11: whether undue satellite litigation has developed and whether the rule causes contentious behavior among counsel.<sup>104</sup> Questions 4 and 5 were designed to answer the question of whether Rule 11 is being applied unfairly.<sup>105</sup> The various surveys discussed in this Commentary indicate that the bottom line to the first five questions is that the courts are encouraging plaintiffs to stop and think, but are giving defendants a free ride. Moreover, the studies suggest that the rule is not worth its costs.

Question 6 sought to answer the question of whether the courts are fashioning the appropriate sanction upon finding a Rule 11 violation.<sup>106</sup> My response to this question is that the judicial response to the amended Rule's standards has been inappropriate. Indeed, the routine imposition of attorneys' fees as a sanction has contributed to the dramatic growth of Rule 11 activity and has disproportionately affected parties who are financially least able to bear the brunt of huge compensatory sanctions.

Question 9 addressed the indeterminacy of the rule.<sup>107</sup> Although Rule 11's objective standard of reasonableness was intended to be a guard against the indeterminate use of the rule, courts have nevertheless applied this standard subjectively. The rule reads as if there is universal agreement as to when a paper is warranted by the facts and the law or by a good faith argument for a change in the law. Yet, this is precisely the area where the greatest indeterminacy can be found. Reasonable minds can often disagree as to what type of inquiry is appropriate under the circumstances and as to whether a reasonable attorney would have filed the paper in question. Would it have been reasonable to challenge *Plessy*

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School, Professor Nelken of Hastings College of Law, and Gregory Joseph of New York City.

101. In its Interim Report to the Chairman and Secretary of the Committee on Rules of Practice and Procedure, the Advisory Committee noted that it under-represented supporters of Rule 11 by design because it "was primarily interested in ensuring that it understood the various proposals for possible revision of the rule." Interim Report, *supra* note 12, at I-4 app. I.

102. The Committee made it clear, however, that it believed the burden was on the critics to justify their complaints about the rule, preferably with empirical data.

103. See Call for Written Comments, *supra* note 9, at 345.

104. See *id.* at 346.

105. See *id.* at 347.

106. See *id.*

107. See *id.* at 349.

in 1920?<sup>108</sup> Would it have been reasonable to challenge *Roe v. Wade* in 1976?<sup>109</sup> This indeterminacy contributes to the rule's chilling effect, because less financially able litigants or lawyers cannot risk being sanctioned.<sup>110</sup>

### B. *The Interim Report*

After considering the responses to its Call for Comments and the testimony taken at the public hearing, the Advisory Committee published an Interim Report that incorporated its findings.<sup>111</sup> Two revealing statements were made in the Summary to the Interim Report. First, the Committee rejected the view of those who believed it was premature to consider amending Rule 11 because more time was needed for an adequate "shake-down" period.<sup>112</sup> Instead, it concluded that sufficient time had passed to permit an informed assessment of the rule, and "that—particularly in the light of the intensity of criticism—the process of possible revision should not be delayed beyond that which the procedures governing rules changes already dictate."<sup>113</sup> Second, the Advisory Committee stated that "the criticisms of Rule 11 have sufficient merit to justify considering specific proposals for change."<sup>114</sup>

The Interim Report also described some of the preliminary findings of the Federal Judicial Center Study and presented the Advisory Committee's Chair's preliminary observations on the questions in the Call for Comments. Some of the important observations were that:

- 1) Rule 11 should not be viewed as the primary means for controlling and deterring groundless litigation;
- 2) while the studies do not indicate substantial discontent among judges regarding the amount of time spent on Rule 11, there are substantial variations among courts and there is a high rate of appeal;
- 3) the filing of Rule 11 motions exacerbates contentious and uncooperative behavior;
- 4) sanctions have been imposed more frequently against plaintiffs

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108. See *supra* note 3 and accompanying text.

109. See *supra* note 5 and accompanying text.

110. The other questions involved subsidiary issues. Questions 7 and 8 were designed to elicit suggestions on how to improve practice and due process under the rule. See *id.* at 348-49. It is clear that the Advisory Committee needs to codify procedure under Rule 11 to insure a higher degree of fairness. For example, targets of Rule 11 motions should be given precise notice of the alleged Rule 11 violation and an opportunity to file more meaningful responses to motions. Judges should be required to articulate precisely why sanctions are being imposed. For a detailed discussion of various suggestions, see Case Law Perspectives, *supra* note 6, § 9, *passim*. Question 10 addressed the relationship of Rule 11 to various other sanctions rules and statutes. See Call for Written Comments, *supra* note 9, at 350. The controversy surrounding Rule 11 provides the Advisory Committee and perhaps Congress with an opportunity to take a comprehensive and consistent approach to sanctions.

111. See Interim Report, *supra* note 12.

112. See *id.* at I-4.

113. *Id.* at I-4-5.

114. *Id.* at I-5.

and in some kinds of cases, though there is insufficient evidence that Rule 11 is being used unfairly in civil rights cases;

5) although there is a greater impact upon certain groups, for example, plaintiffs, there is insufficient evidence that Rule 11 is having a "chilling effect;"

6) there is concern that monetary sanctions have become the norm for sanctions under Rule 11;

7) questions as to timing of making and deciding Rule 11 motions are problematic;

8) although court of appeals decisions have sufficiently clarified the law as to proper procedures, any revision of the rule should incorporate basic standards;

9) there is substantial variation among judges in their enforcement of the rule; and

10) although unification of sanctions rules may be desirable, creation of a single rule may not be possible because of the different kinds of situations the different rules are designed to address.<sup>115</sup>

The Advisory Committee's receptiveness to change is welcome, and its Interim Report fortunately has paved the way for an amended Rule 11.

### C. *Proposed Amendments*

#### 1. The Advisory Committee's Proposed Draft

As suggested in its Interim Report, the Advisory Committee concluded that although some of the criticisms of Rule 11 were "exaggerated or premised on faulty assumptions," widespread criticisms were "not without some merit."<sup>116</sup> It recognized that Rule 11 impacts plaintiffs "more frequently and severely" than defendants, that it "occasionally" creates problems for litigants seeking to assert novel legal positions or who need discovery from an adversary, and that it is enforced too infrequently through nonmonetary sanctions.<sup>117</sup> The Committee also noted that, "with cost-shifting having become the normative sanction," the rule contains no incentive to withdraw claims that become insupportable and sometimes creates attorney-client conflicts and "exacerbate[s] contentious behavior between counsel."<sup>118</sup>

Despite these findings, the Advisory Committee rejected the idea of returning Rule 11 to its pre-1983 bad faith standard.<sup>119</sup> Rather, it has

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115. *Id.* at I-10-25.

116. Letter from Judge Sam C. Pointer to Hon. Robert E. Keeton, June 13, 1991 (revised), reprinted in 137 F.R.D. 63, 63 (1991).

117. *Id.* at 64-65.

118. *Id.*

119. The Committee stated:

The revision is designed to increase the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while at the same time actually reducing the frequency of Rule 11 motions. It does not adopt the suggestions made by many that sanctions be imposed only for willful violations, or be made permissive rather than mandatory. Such changes would

proposed several major changes to Rule 11. These changes can be seen in its suggested revision of the fifth sentence of Rule 11:

(b) Representations to Court. By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, written motion, or other paper filed with or submitted to the court, an attorney or unrepresented party is certifying, until it is withdrawn, that to the best of the person's knowledge, information, and belief formed after inquiry reasonable under the circumstances—

(1) it is not being presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) any allegations or denials of facts have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.<sup>120</sup>

There are four major revisions to the rule. The Advisory Committee first suggests that signatures no longer serve as the triggering event to a Rule 11 motion. Instead, the operative event should be the "presenting or maintaining" of a representation to the court. This suggestion eliminates the "snap-shot" rule—pursuant to which a paper could be judged under Rule 11 only as of the time the paper was signed—and significantly broadens the scope of the rule. Under the snap-shot rule, a court cannot sanction an attorney who makes a reasonable inquiry as of the time a paper was filed, but who refuses to withdraw the paper when subsequent discovery or research shows the position taken is untenable. The new language codifies the "continuing duty" concept, whereby a party may be sanctioned if the paper or position becomes insupportable.<sup>121</sup>

This broadening of the rule, however, is unnecessary. In its present form, it is already relatively easy to retrigger Rule 11. If discovery or further research discloses that a position is insupportable, and an adversary refuses to withdraw it, Rule 11 is retriggered whenever the adversary files baseless papers in opposition to a dispositive motion.

Although it changes the language of the rule slightly, the Proposed Draft retains the "reasonable inquiry" requirement. Thus, the Advisory

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be inappropriate in view of the modifications in the wording of the obligations—in effect permitting a party, if candid in its papers, to advance innovative theories of law and to make allegations based on information and belief—and in view of the provisions affording a "safe harbor" from Rule 11 motions through the opportunity, after notice, to withdraw voluntarily from insupportable positions. In light of these changes, violations of the rule would rarely involve conduct that is not either willful or deceptive, and hence some form of sanctions should be imposed.

*Id.* at 65.

120. Proposed Draft, *supra* note 13, at 2-3.

121. For a discussion of the snap-shot rule and the continuing duty, see Case Law Perspectives, *supra* note 6, § 5.04, at 335-50.



Committee rejects the suggestion of some commentators that it would be preferable to delete the reasonable inquiry requirement and to require instead that only nonfrivolous papers be filed. Some critics of the "conduct" approach argue that it intrudes on the attorney-client relationship and that it wastes judicial resources to inquire into what an attorney did pre-filing even when the claim filed is colorable.<sup>122</sup> However, many judges and lawyers praise the requirement that attorneys stop and think before filing, because it has been effective in deterring some baseless filings.<sup>123</sup> There is little reason to abandon the one aspect of the rule which has been somewhat successful. However, this portion of the rule should be clarified to prevent courts from inquiring into what an attorney did in the pre-filing stage unless the paper is groundless.

"Although continuing to require litigants to 'stop and think' before initially making legal or factual contentions,"<sup>124</sup> the Advisory Committee's proposed revision "places equal emphasis on the duty of candor<sup>125</sup> and on the obligation to withdraw from positions when they are no longer tenable."<sup>126</sup> There are two problems, however, with incorporating the duty of candor into Rule 11. First, permitting sanctions to be imposed based on how an argument is made unnecessarily extends the rule.<sup>127</sup> Second, other sanction devices exist to punish the offender<sup>128</sup> if the argument identification, miscitation, or misrepresentation of fact is willful.

The second major revision attempts to respond to the unequal burden Rule 11 places on plaintiffs. Recognizing that sometimes a litigant has good reason to believe, without yet knowing, that a fact is true or false, the Proposed Draft also substantially changes the language of the certification with respect to facts.<sup>129</sup> Rather than state that the paper is warranted by the facts, the Committee's proposal requires that a party's "allegations or denials of facts have evidentiary support," or, if specifically so identified, are likely to have evidentiary support.<sup>130</sup> To insure that this language will be understood as softening the rule, the Advisory Committee notes that the standard is not whether a party has sufficient

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122. See New York State Bar Ass'n, Comments on Rule 11 of the Federal Rules of Civil Procedure 13-14, 16-17 (Nov. 1990).

123. See *supra* notes 34-36 and accompanying text.

124. Proposed Draft, *supra* note 13, at 5 (Advisory Committee Note).

125. There are two aspects of the duty of candor: argument identification and failure to cite. For a discussion of cases addressing the duty of candor, see Case Law Perspectives, *supra* note 6, § 5.03[c][1][A], at 315-17 and § 6.04[d], at 440-57.

126. Proposed Draft, *supra* note 13, at 5 (Advisory Committee Note).

127. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986).

128. For example, a court can employ 28 U.S.C. § 1927 or use its inherent power to punish parties who litigate in bad faith. See *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2135 (1991).

129. For a discussion of this problem, see Case Law Perspectives, *supra* note 6, § 4.01[b], at 193 and § 6.03[f], at 405-07.

130. Proposed Draft, *supra* note 13, at 3.

facts to prevail, but instead whether there is or there is likely to be support.<sup>131</sup> The concept behind this change to Rule 11 is a positive one, because it is a more forgiving standard when a litigant is not in possession of relevant facts. However, its implementation may be problematic. If the amended rule is used like the 1983 version, a change of language such as this probably will cause an increase in Rule 11 litigation, because parties will dispute whether discovery is likely to result in the facts alleged and whether the pleader properly identified which facts were supportable and which needed discovery.

The third, and perhaps most important, suggestion of the Proposed Draft is procedural: it insures that notice will be given to targets, clarifies the procedure for making Rule 11 motions, and provides a safe harbor for targeted parties. This change would require parties to raise Rule 11 issues in a separate motion and to describe the "specific conduct that appears to violate" the rule.<sup>132</sup> In addition, it would prevent parties from filing or presenting Rule 11 motions to the court "unless the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or corrected within 21 days (or such other time as the court may prescribe) after service of the motion."<sup>133</sup> The purpose of this proposed revision is to make it possible for a litigant to withdraw a claim that it knows is insupportable without having to risk Rule 11 sanctions. It also is intended to reduce the current practice of making threats or sending vague "Rule 11 letters" to bully an opponent into withdrawing a paper or position.

The Advisory Committee's Proposed Draft also provides a safe harbor by prohibiting a court from imposing monetary sanctions *sua sponte* unless an order has been issued that both specifically describes the conduct that violates the rule and requires the party to show cause why it should not be sanctioned for violating the rule. The safe harbor provisions are the most important additions to the rule. A litigant who has made a mistake should have the opportunity to withdraw a paper without suffering sanctions.

Unfortunately, the Proposed Draft's rejection of the "paper-as-a-whole" approach undermines the benefits of the safe harbor provisions. The proposed amendments shift the focus from the paper-as-a-whole to each aspect of a paper (*i.e.*, a party violates Rule 11 by "presenting or maintaining a claim, defense, request, demand, objection, contention, or argument").<sup>134</sup> As a result, repeated Rule 11 motions can be served attacking different or insignificant aspects of a paper.<sup>135</sup> This, unfortu-

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131. *See id.* at 6.

132. *Id.* at 4.

133. *Id.* at 3.

134. *Id.* at 2.

135. The Advisory Committee makes clear in its note that each aspect of a paper should be analyzed, and that the sanctions imposed should flow directly from that analysis. Thus, the "paper-as-a-whole" approach, by which a litigant who filed a paper con-

nately, may cause more confusion and collateral litigation.<sup>136</sup>

If a motion is filed and is successful, the Proposed Draft resolves the problem of what a Rule 11 order should consist of by requiring the district court, on request, to "recite the conduct or circumstances determined to constitute a violation of this rule and explain the basis for the sanction imposed."<sup>137</sup> It also continues to permit sanctions to be imposed on a motion if a case is settled or voluntarily dismissed. However, the twenty-one day waiting period designed to provide targets with an opportunity to settle or voluntarily withdraw should reduce the kind of "sandbagging" that the Supreme Court permitted in *Cooter & Gell*.<sup>138</sup> Under the Proposed Draft, a potential Rule 11 target need not worry about sanctions if it withdraws a paper or its position before a motion is made, because presumably a Rule 11 motion cannot be served unless there is some paper, claim, or contention that can be withdrawn within the twenty-one-day period. Similarly, when a court seeks to impose sanctions *sua sponte* under the proposed revision, monetary sanctions may not be imposed unless the order to show cause was issued before settlement or voluntary dismissal. Thus, a party will not have to worry about post-dismissal sanctions from its adversary or from the court.

In an effort to deemphasize cost-shifting, the fourth major revision of the Proposed Draft is its codification of the "least severe sanction" rule: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter comparable conduct by persons similarly situated."<sup>139</sup> Instead of isolating attorneys' fees as a type of permissible sanction, the Proposed Draft mentions "directives of a nonmonetary nature."<sup>140</sup> Although it allows monetary sanctions, it makes clear that attorneys' fees may be awarded only when sanctions are imposed on motion. It also provides that partial fees may be awarded and that only fees and "costs incurred as a direct result of the violation" may be awarded.<sup>141</sup>

The Proposed Draft also allows a court to impose "an appropriate sanction upon the attorneys, law firms, or parties determined, after notice and a reasonable opportunity to respond, to be responsible for a violation of [the rule]."<sup>142</sup> This language holds non-signers sanctionable, thereby

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taining baseless as well as colorable claims would not be sanctioned if the "paper-as-a-whole" was colorable, has been abandoned. *Id.* at 5.

136. See Case Law Perspectives, *supra* note 6, § 5.04[a], at 336-39.

137. Proposed Draft, *supra* note 13, at 4.

138. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1991). For a discussion of this case, see *supra* notes 71-84 and accompanying text.

139. Proposed Draft, *supra* note 13, at 4.

140. *Id.*

141. *Id.* The Advisory Committee Note picks up on the language by explaining that there is a duty of mitigation, by setting forth a range of nonmonetary sanctions, and by detailing the factors a court should consider in determining what sanction should be imposed. See *id.* at 6-7 (Advisory Committee Note).

142. *Id.* at 3.

superceding the Court's decision in *Pavelic & LeFlore*.<sup>143</sup> Unfortunately, this suggested change may result in more protracted Rule 11 proceedings in many cases, as courts will be required to determine relative culpability.<sup>144</sup>

## 2. The Bench-Bar Proposal

Prominent federal judges and lawyers have put forth a counter-proposal to address three critical problems in the Advisory Committee's Proposed Draft.<sup>145</sup> The Bench-Bar Proposal's proponents claim that the Advisory Committee's Proposed Draft has the potential for engendering a Rule 11 controversy over every claim, defense, argument, or contention made in a case. They also argue that the requirement that a position be abandoned may turn a lawsuit "not into a prospective search for the truth but into a retroactive exercise in perfected pleadings."<sup>146</sup> Third, they contend that the bar will use the new safe harbor provision counterproductively:

The business of (a) endless amplification of the grounds for sanctions; and (b) endless correspondence of the "you did it" and "no I didn't" variety adds enormously to the cost of litigation. . . . From the standpoint of one of the unhappiest aspects of Rule 11, the decrease of civility within the profession, the proposal accentuates the deterioration of professional relations.<sup>147</sup>

The Bench-Bar Proposal strips down the language of the Advisory Committee's proposal. Paragraph (1) simply requires papers to be signed and is essentially the same as paragraph (a) of the Advisory Committee proposal.<sup>148</sup> Paragraph (2) rejects the new certification language of the Advisory Committee's proposal, instead advocating certification language similar to that in the 1983 version of the rule. This paragraph states that the signature constitutes a certificate that the paper has been read and that "to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the paper *taken as a whole* is well grounded in fact and law, *including non-frivolous arguments for possible change of law*, and that it is not interposed for any improper purpose."<sup>149</sup>

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143. *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct 456, 458-59 (1989); see *supra* notes 66-69 and accompanying text.

144. Under proposed subsection (c)(2)(A), monetary sanctions may not be awarded against a represented party unless it caused the presentation or maintenance of a position for an improper purpose. See Proposed Draft, *supra* note 13, at 4. To the extent that the Advisory Committee was concerned about attorney-client relations, the proposal will do little. An attorney who seeks to avoid sanctions may still want to defend by pointing out that the client wanted a paper filed for some improper purpose, such as to delay the proceedings.

145. Bench-Bar Proposal, *supra* note 14.

146. *Id.* at 1.

147. *Id.* at 2.

148. See *id.* at 4.

149. *Id.* at 4. The underscored words mark the new language suggested by the Bench-Bar proposal.

Bench-Bar proponents thus seek to avoid litigation over each contention in a paper. Such litigation, they argue, would distract the parties from the merits of the case. The words "taken as a whole" were added to require the court to assess the paper as a whole. The Bench-Bar Proposal also simplifies the meaning of the certification with respect to the law. The phrase "including non-frivolous arguments for possible change of law" is intended to avoid codifying the duty of candor and to provide a lenient standard to avoid the chilling problem.<sup>150</sup>

Paragraph (3) of the Bench-Bar Proposal provides for sanctions on motion or *sua sponte*, but with an important difference from the Proposed Draft. It states that a court *may* impose sanctions if a Rule 11 violation is found, rather than *shall* impose a sanction.<sup>151</sup> This modification gives judges discretion to refuse to impose sanctions in appropriate cases, such as when there has been a minor or technical Rule 11 violation.

Like the Proposed Draft, the Bench-Bar Proposal would permit sanctions to be imposed against a law firm. However, it would not permit sanctions to be imposed against represented parties unless they were responsible for a filing for an improper purpose. Thus, it limits the sanction to what would be sufficient to deter comparable conduct by persons similarly situated.

The Bench-Bar Proposal prohibits sanctions in the nature of attorneys' fees. Instead, it proposes that all monetary sanctions be paid to the court. The elimination of attorneys' fees is justifiable as a means of eliminating the use of Rule 11 as a fee-shifting device. It is unfortunate, however, that the proposal does not retain the availability of nonmonetary sanctions such as reprimands.

The Bench-Bar Proposal states in paragraph (4) that "[n]o sanction shall issue until the attorney or party who may be sanctioned has been given notice based upon a precisely stated alleged violation of the rule and has had the opportunity to be heard either orally or in writing."<sup>152</sup> The proposal should be clarified to provide an explicit safe harbor. For example, it could provide that "no sanction shall issue if the attorney or party promptly withdraws the paper after such notice has been given."

Finally, the proposal requires "written findings of fact and conclusions of law" whenever sanctions are imposed.<sup>153</sup> These procedural protections are comparable to those proposed by the Advisory Committee.

## V. CONCLUSION

The Bench-Bar Proposal characterizes the Advisory Committee's Pro-

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150. *Id.*

151. *See id.* at 4.

152. *Id.* at 5.

153. *Id.* These findings "shall consider the duty violated; the actual injury caused; and the existence of aggravating or mitigating circumstances." *Id.*

posed Draft as "mak[ing] a very bad matter much worse than it was before."<sup>154</sup> Clearly, the Advisory Committee's approach was to add new language and procedures in an attempt to make the rule more precise and controllable. While the safe harbor idea is an excellent one, one wonders whether it will have its desired effect. There is a danger that the more expansive innovations will predominate, creating more satellite litigation without solving the real problems identified by the Advisory Committee.

On the other hand, the Bench-Bar Proposal does not yet have as extensive an explanatory note as the Advisory Committee, and thus does not provide a great deal of information as to how the rule ought to be interpreted and applied.<sup>155</sup> Given its similarity to the current Rule 11 language, there is a potential for judges and lawyers who have employed Rule 11 abusively to continue that behavior. In addition, there is no explicit safe harbor in the Bench-Bar Proposal, and there is no provision for imposing nonmonetary sanctions. Yet, given the last eight years' experience, the Bench-Bar Proposal has greater potential for eliminating the harmful effects of Rule 11 because it is simpler and does not introduce new language that the bar is likely to dispute.

Both proposals are aimed at egregious conduct. Thus, the framers of both proposals believe that the abusive, not merely the wrong-headed, should be the targets of Rule 11. The Advisory Committee's Proposed Draft contains a number of important procedures for weeding out improper Rule 11 activity. Yet, its emphasis on each allegation and position taken will necessarily invite more Rule 11 activity and detract from the merits of the litigation.

Because it provides for discretionary sanctions and precludes the imposition of attorneys' fees as a sanction, the Bench-Bar Proposal will insure that Rule 11 motions will be made almost exclusively in egregious cases because it eliminates the fee-shifting incentive. If a party believes that the party opposing it has filed a baseless paper, it will still be in that party's interest to seek to have the adversary voluntarily withdraw the paper in order to keep legal fees and costs to a minimum. Thus, removing the opportunity to receive an attorneys' fee award may be the best safe harbor available and may eliminate satellite litigation. Because the goal of Rule 11 is to streamline litigation, therefore, the Bench-Bar Proposal provides the best ammunition for attacking and eliminating abusive trial practices.

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154. *Id.* at 1.

155. For example, an explanatory note might state that ordinarily, sanctions should not be imposed when a party has voluntarily discontinued an action, or if the case has been settled.